Supreme Court, U.S.
FILED
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CLERK

No. 96-189

In The

Supreme Court of the United States

October Term, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

MARK BARRERA and PATRICK MUSALL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

RESPONDENT BARRERA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHERE THE MICHIGAN SUPREME COURT RULED THE APPLICATION OF A MICHIGAN RULE OF EVIDENCE BY A STATE TRIAL COURT; DISALLOWING A STATEMENT AGAINST PENAL INTEREST FAVORABLE TO RESPONDENT, AS AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS OF LAW, DOES THIS COURT HAVE JURISDICTION; AND IF THIS COURT HAS JURISDICTION, SHOULD A STATE COURT RULING BASED ON THE FACT THE MICHIGAN SUPREME COURT FOUND THE CO-DEFENDANT'S STATEMENT TO BE CORROBORATED AND BOTH EXCULPATORY OF RESPONDENT AND AGAINST THE CO-DEFENDANT'S PENAL INTEREST AND THEREFORE ADMISSIBLE, BE REVIEWED BY THIS COURT.

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OPINION BELOW

Michigan Supreme Court opinion is reported. 451 Mich 261 (1996).

JURISDICTION

This Court lacks jurisdiction, because the Michigan Supreme Court ruled the application of a Michigan Rule of Evidence by a state trial court; disallowing a statement against penal interest favorable to Respondent, as an abuse of discretion and a violation of due process of law. Thus, there was an independent state ground for its ruling.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOKED

Petitioner has cited the relevant constitutional and statutory provisions in the petition.

STATEMENT OF THE CASE

Mark Barrera was convicted of felony murder after a jury trial in Detroit Recorder's Court in March of 1989. It was the prosecutor's theory that Mr. Barrera aided and abetted Matthew Copeland in the killing, during the course of either a larceny or criminal sexual conduct (rape), or with premeditation, of a prostitute.

Mr. Barrera's position was that he did not know that Matthew Copeland was going to stab the prostitute to death. He indicated that his only involvement was being present at the scene and placing his foot on the prostitute's head and telling her to be quiet. It was further his position that Matthew Copeland was freaking out on mescaline and thought that the prostitute was his ex-girlfriend. In addition to Mr. Barrera, Copeland and Musall, who were convicted, a fourth person in the car and at the scene was tried and acquitted of the charges by a separate jury.

Mr. Barrera's statement was read to the jury. The statement stated that Mr. Barrera had been drinking beer at Balduck Park while Copeland and co-defendant Johnson undressed the prostitute. Copeland had oral sex with her and then Musall did. Barrera's statement said that he was shocked when Copeland began to beat the prostitute and then stabbed her. In the statement Mr. Barrera admitted to kicking her in the head before the stabbing, because she was screaming.

The statement further indicated neither Mr. Barrera, nor the three others at the scene, took anything from her. He denied there was any plan to rape or rob her, but rather they picked her up to employ her.

The prosecutor asked Sanders if he had taken a statement from Copeland, to which he replied, "Yes".

On recross examination by defense counsel, Sanders admitted he never included in his report Mr. Barrera's denial of guilt.

A discussion was had outside the presence of the jury as to the admissibility of Matthew Copeland's statement. Defense counsel argued that since the prosecutor asked if Sanders had taken a statement from Copeland, the prosecutor opened the door as to its admissibility. In addition, defense counsel argued that Copeland's statement, which was against Copeland's penal interest, was admissible as an exception to the hearsay rule.

Copeland testified that he would exercise his right to remain silent and, therefore, was found to be unavailable by the court. The prosecutor argued against Copeland's statement being admitted as not being against Copeland's interest. Defense counsel noted that Copeland admitted killing the prostitute and, therefore, it was against his interests. It was also indicated to the court that Copeland's statement was corroborated, because all defendants said in their own statement that it was Copeland who had committed the stabbing.

The trial court ruled that MRE 804(b)(3) required the statement to be exculpatory of the defense. Since it said other defendants had knives, it was not exculpatory. The court also said it was not inculpatory as to Copeland.

Defense counsel then moved for a mistrial, because he was relying on the admissibility of Copeland's statement as part of his defense, which he raised in opening argument. The trial court denied that motion.

The prosecutor rested in front of the jury.

The jury returned that afternoon with a verdict of guilty of first degree felony murder. At sentencing, it was

noted that the jury sent back a note asking for the possibility of returning a verdict of guilty of criminal sexual conduct in the first degree.

The Michigan Supreme Court ruled the trial court's interpretation of MRE 804(b)(3) was an abuse of discretion under Michigan law:

> In sum, we believe that the totality-of-the-circumstances test adopted in *Pools*, 444 Mich 165, may be applied in the instant context. It requires the trial court to consider the contents of the statement itself, the circumstances surrounding the declarant making the statement, and all other relevant facts in the case. In addition, where the statement was made to the authorities while the declarant was in custody, the trial court should consider the three-factor inquiry.
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> * * *
>
> However, we find other corroborating circumstances presented in this case, which we will explain below.
>
> * * *
>
> The trial court found that Copeland's statement was not inculpatory. We disagree. We find that Copeland's statement would have been probative of many possible crimes. He admitted taking an illegal controlled substance: "We took hits of mescaline." He admitted negotiating with a prostitute for a sex act. More importantly, he admitted to stabbing the victim:
>
> * * *
>
> The trial court excluded that statement in part because it found that Copeland was "really

making an excuse for his conduct" rather than making "a clear statement of his own criminal responsibility." However, MRE 804(b)(3) merely requires that the statement be probative against the declarant. We find that we can present no argument more persuasive than the prosecutor's later position regarding why Copeland's statement was probative of criminal responsibility. At Copeland's trial, the prosecutor argued during his closing argument:

> [Mr. Less:] Now, Mr. Copeland makes a statement to Sergeant Sanders, and that statement, you heard it yesterday afternoon, and you can take that into the jury room with you. There are certain things that I went through when I read that statement that just struck me as being – jumping out at me, jumping out. And I'm going to tell you. . . .
>
> Mr. Copeland, in his statement, kind of sets the mood. Yeah, he's out with his friends, he says, and they're going to drive around, have some laughs. He tells you: "We decided to get together and have a few laughs." Him and Mr. Barrera and Mr. Musall and Mr. Johnson. They're going to have a few laughs.
>
> Then he tells you, going to take some mescaline and drink some beer. And then he tells in the statement all about mescaline because, in his words, "I took a drug class. That's how I know." He's an expert, man. He's a self-made expert on drugs.
>
> So what does he do? He's going to tell you how these drugs inflamed his mind and clouded his mind and he couldn't form an

intent to do any crime. Well, let's see what he tells us. He takes the mescaline. "We were out cruising around, looking for people to laugh at." Mr. Copeland is going to drive around, and that's a fun way to have a date. We're just going to go up and down Van Dyke, out of our neighborhood, look for people to laugh at.

Page 4 is where his contradictions start. After he claims they pick up the deceased, the victim in this: "We left that neighborhood because there is racial problems over there, you know." And his next sentence after he says that is: "By that time, I had the full effect of the mescaline going."

Well, let's think about something. If you leave a neighborhood because you perceive there to be some kind of problem, what does that show you? If you can think of that – I mean, if you can make that determination, doesn't it show that you're conscious? Doesn't it show that you're purposeful? Doesn't that show that you know where you're at and what's going on and you can make a decision?

* * *

Then we come on page 5, while the victim is "giving Mike head," I kept thinking about that, and the more I thought about that, that's when I had it in me that she was Spooner." Well, he's thinking about it. I mean, he's out here . . . and he's weighing it in his mind.

* * *

> Then, on page 6, he says, "I told her, 'I'm going to kill you.' " Well, what could be clearer of a person's intent? If someone says, "I'm going to" – if someone comes up to me and says, "I'm going to kill you," I'm going to take that kind of seriously because, if someone's saying that, . . . it shows what they're doing. And then, if they do something, if they pull a gun out or get something pointed at me after they said those words, I would have no doubt of what their intent is. . . .
>
> * * *
>
> On page 9, Sergeant Sanders asked him some questions and he says: "I forced myself to stab her." No one is – the drugs aren't forcing him. It's not that he doesn't know what he's doing. It's not that he's not aware of what's going on. . . . [T]here's something else on page 9. . . . [H]e says, "I got some head from her, but I stopped because I was afraid of getting a disease." Here's a guy that's supposed to have the full effect of the mescaline going. He doesn't know what he's doing. The drugs have obliterated his good judgment and he can't form any intent, and yet he can think about communicating diseases. . . . [T]hat shows a consciousness, that shows a sense of surrounding, that shows a mind free and clear of any wild and – you know, hallucinations.

The Prosecutor obviously found Copeland's statement to be reliable probative evidence of Copeland's guilt. He cannot now argue that it was not. *Green v Georgia*, 442 US 95, 97; 99 S Ct

2150; 60 L Ed2d 738 (1979) (the statement was sufficiently reliable for the state's case); *Rivera*, 915 F2d 282 ("The confession was reliable enough to be used to put [the declarant] away for the rest of his life, and no reason is suggested why, if only it had been made to a close friend – but not otherwise – it would be reliable evidence of [the defendant's] innocence as well"); *United States v Brainard*, 690 F2d 1117, 1125 (CA 4, 1982) ("The government's attempt to have it both ways strikes us as imprudent and unfair"); *Thomas*, 571 F2d 289 ("The statement may be offered by the government to inculpate the declarant or by the accused to exculpate himself").

* * *

Because the explanation for the stabbing was evidence crucial to Barrera's theory of defense, his constitutional right to present this evidence limited the threshold of corroborating circumstances that the court could require of Copeland's statement. We find that the trial court improperly focused on minor inconsistencies in the statement. Those inconsistencies go to the weight of the evidence – not to its admissibility. *Garcia*, 986 F2d 1140-1141. The *primary* statement in the confession was corroborated by the statements of all three codefendants: Copeland spontaneously acted alone in the stabbing.

* * *

Under the *Poole* factors, we note that although the statement was made to law enforcement officers, instead of shifting blame to *himself* by explaining his personal motive for the killing, and by expressly stating that to his knowledged no one else stabbed the victim.

However, "[h]is incentive, one might think, was to inculpate as many other persons as possible and minimize his own involvement." *Rivera*, 915 F2d 283.

We conclude that the trial court abused its discretion in excluding Copeland's statement and violated the Due Process Clause of the Fourteenth Amendment. *Barrera*, 451 Mich 261, at 275-6, 278, 281, 282-5, 289, 290 (1996). (Emphasis in original).

REASONS WHY THE WRIT SHOULD BE DENIED

I. WHERE THE MICHIGAN SUPREME COURT RULED BASED ON A STATE RULE OF EVIDENCE, MRE 804(b)(3), THAT THE TRIAL COURT ABUSED ITS DISCRETION BY DISALLOWING A CO-DEFENDANT'S STATEMENT AGAINST PENAL INTEREST FAVORABLE TO THE RESPONDENT USING FEDERAL LAW FOR GUIDANCE ONLY, THIS COURT LACKS JURISDICTION TO REVIEW THE STATE COURT'S DECISION.

The Michigan Supreme Court began its discussion of its review of the trial court's application of Michigan Rule of Evidence 804(b)(3) by noting the single issue was whether or not "the trial court abused its discretion in denying the request of the two defendants to admit Copeland's (co-defendant) confession." 451 Mich 266.

The state court noted the argument of respondent raised two mistakes by the trial court. First, the statement of co-defendant, being against his penal interest, was within an exception to the state hearsay rule, MRE 804(b)(3). Second, the trial court's ruling "violated due process right to present witness in their defense." *Id.* at 266.

The state court specifically said it was interpreting a state evidentiary rule – MRE 804(b)(3). It noted it was a rule similar to the federal rule of evidence. FRE 804(b)(3). The court then, citing a prior state supreme court case, said it was looking to federal precedent for guidance. *Id.* at 267.

After discussing the facts of the case and the interpretation of MRE 804(b)(3), the Michigan Supreme Court

concluded that the trial court abused its discretion, and, violated the Due Process Clause of the Fourteenth Amendment. Thus, it is clear, there is an independent state ground to support the conclusion that Mr. Barrera was entitled to a new trial. That is, an abuse of discretion in applying MRE 804(b)(3). See *Michigan v Long*, 463 US 1032 (1983). Therefore, this Court lacks jurisdiction to review that Michigan Supreme Court decision.

II. THE MICHIGAN SUPREME COURT'S DECISION INTERPRETING MRE 804(b)(3) TO REQUIRE, UNDER STATE LAW AND DUE PROCESS OF LAW, THE ADMISSION OF A CO-DEFENDANT'S CORROBORATED, INCULPATORY STATEMENT, WHEN EXCULPATORY OF THE ACCUSED AND INTRODUCED BY THE ACCUSED, WAS CORRECT.

Mr. Barrera was convicted of first degree felony murder for his alleged participation in the events that resulted in the death of Ms. Haynes. Mr. Barrera, Musall, and Johnson were tried together, but with separate juries. Mr. Barrera and Musall were convicted and Johnson was acquitted.

Counsel for Mr. Barrera told the jury that Copeland had admitted to stabbing Ms. Haynes on his own without any planning.

The trial court's ruling disallowing the statement of Copeland, on the grounds that it was not inculpatory of Copeland and not exculpatory of Mr. Barrera and not reliable, was a misapplication of MRE 804(b)(3). The state

court agreed. *Id.* at 290. The exculpatory nature of Copeland's statement is self-evident and buttressed by the fact that the defense was relying on it to at least reduce the conviction from first degree murder to second degree murder or manslaughter or to result in an acquittal. As to the reliability of the statement and its inculpatory nature, one only has to look to the opening argument of the prosecutor[1] in the Copeland trial. The prosecutor told the jury that,

> . . . **but the most telling thing you're going to hear is Mr. Copeland made a statement at the time of his arrest.** You're going to hear a statement that he made to the Detroit Police Department regarding this, where he admits he's a person that did all of this. (Copeland trial, 8/21/89). (Emphasis added).

Finally, if this Court were to rule that the requirements of MRE 804(b)(3) for a statement against interest had not been met, then the application of the rule to this fact situation would be a denial of Mr. Barrera's constitutional rights to present a defense. Therefore, a new trial is required where Mr. Barrera would be allowed to present Copeland's statement to the jury.

FACTS

Mr. Barrera's defense was that he did not know that Matthew Copeland was going to stab the prostitute to death. In opening argument he indicated that his only

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[1] The same prosecutor who prosecuted Mr. Barrera. His argument was quoted extensively by the state supreme court. *Id.* at 282-4.

involvement was being present at the scene and placing his foot on Ms. Haynes' head and telling her to be quiet. It was further his position that Matthew Copeland was freaking out on mescaline and thought that Ms. Haynes was his ex-girlfriend.

Mr. Barrera did not testify at trial, but rather was going to rely on Mr. Copeland's statement.

After the prosecutor had Police Officer Sanders introduce to the jury the statement made by Mr. Barrera, the prosecutor elicited that Sanders had taken a statement from Matthew Copeland.

A discussion was had outside the presence of the jury as to the admissibility of Matthew Copeland's statement. Defense counsel argued that since the prosecutor asked if Sanders had taken a statement from Copeland, the prosecutor thereby opened the door as to its admissibility. In addition, defense counsel argued that Copeland's statement, which was against Copeland's penal interest, was admissible as an exception to the hearsay rule.

Copeland testified outside the presence of the jury that he would exercise his right to remain silent and, therefore, was found to be unavailable by the court. The prosecutor argued against Copeland's statement being admitted as not being against Copeland's interest. Defense counsel noted that Copeland admitted killing the prostitute and, therefore, it was against his interests. It was also indicated to the court that Copeland's statement was corroborated, because all defendants said in their own statement that it was Copeland who had committed the stabbing.

TRIAL COURT'S RULING

The trial court ruled that MRE 804(b)(3) required the statement to be exculpatory of the defense. Since it said other defendants had knives, it was not exculpatory. The court also said it was not inculpatory as to Copeland.

Defense counsel then moved for a mistrial, because he was relying on the admissibility of Copeland's statement as part of his defense, which he raised in opening argument. The trial court denied that motion.

RULE OF EVIDENCE

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant –

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

* * *

(b) Hearsay Exception. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness;

* * *

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable person in his position would not have made the

> statement unless he believed it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.** At 455. (Emphasis added).

RULING ERRONEOUS UNDER RULES OF EVIDENCE

Mr. Barrera had said in his statement that was presented to the jury that he was shocked when Copeland began to beat the prostitute and then stabbed her. The statement further indicated neither Mr. Barrera, nor the three others at the scene, took anything from her. He denied there was any plan to rape or rob her, but rather they picked her to employ her services.

Copeland's statement was consistent with Mr. Barrera's version of the killing. Specifically, the statement of Copeland negated any implication that the killing was planned or even foreseeable. Copeland admitted that he did it, because he was hallucinating from the use of mescaline.

The trial court's interpretation of MRE 804(b)(3) that the proposed statement was not both exculpatory of Mr. Barrera and inculpatory as to Copeland was error. The fact that defense counsel was relying on the statement to make a substantial portion of his defense is evidence enough that the statement was exculpatory. More importantly, a reading of the statement shows clearly that it supports Mr. Barrera's defense.

As to the trial court's conclusion that the statement was not inculpatory as to Copeland, that conclusion does

not survive a reading of Copeland's statement. The statement is an admission by Copeland of his sole responsibility for freaking out and killing the prostitute.

Certainly, the circumstances of the killing, as well as the statement of Mr. Barrera, corroborate the confession of Mr. Copeland. In the language of the prosecutor, probably the most telling corroboration of Copeland's statement was the use of that statement by the prosecutor against Copeland.

> . . . **but the most telling thing you're going to hear is Mr. Copeland made a statement at the time of his arrest.** You're going to hear a statement that he made to the Detroit Police Department regarding this, where he admits he's a person that did all of this. (Copeland trial, 8/21/89). (Emphasis added).

Thus, the Michigan Supreme Court held this ruling of the trial court was erroneous.

RULING UNCONSTITUTIONAL

The ruling of the trial court deprived Mr. Barrera of his right to present a defense. See, US Const Am XIV; Const 1963, art 1; § 17, § 20, *Green v Georgia*, 442 US 95 (1979); *Chambers v Mississippi*, 410 US 284 (1973); *Washington v Texas*, 388 US 14 (1967); see also, *Rivera v Director, Department of Corrections, State of Illinois*, 915 F2d 280 (7th Cir, 1990), where Judge Posner wrote for the unanimous court that the refusal of the state trial court judge to allow into evidence the confession of Rivera's co-defendant, who was tried separately, which exculpated Rivera, denied Rivera due process of law.

In reaching its decision, the court held,

> Without the confession, it was Rivera's word against Meger's. **The confession thus was vital evidence.** The Supreme Court held in *Chambers v Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), that **"the hearsay rule may not be applied mechanistically to defeat the ends of justice."** The due process clause entitles a criminal defendant to demand, irrespective of the state's hearsay rule, a trial "adequate to separate the guilty from the innocent." *Gomez v Greer*, 896 F.2d 252, 254 (7th Cir, 1990). So **if the defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason than that it is hearsay.** No better reason was given in this case. *Id.* at 281-2. (Emphasis added).

The court went on to reject the state's argument that the co-defendant's statement was unreliable, because it was inconsistent with another witness' testimony. "it begs the question to *assume* that Meger's [co-defendant's] testimony was reliable, implying that *any* contrary evidence would be unreliable." *Id.* at 282. (Emphasis in original). Implicit in this ruling is that it is for the jury to determine the weight to be given the co-defendant's statement, not the trial court or the appellate court.

Judge Posner also rejected the state's argument that *Chambers* did not apply, because the statement was given to a police officer rather than to a close friend as in *Chambers*. He characterized this argument as silly. *Id.* at 282.

> The Supreme Court does not sit to decide cases that will control only cases having identical

> facts. **The confession was reliable enough to be used to put Norman away for the rest of his life, and no reason is suggested why, if only it** had been made to a close friend – but not otherwise – it would be reliable evidence of Rivera's innocence as well. *Id.* at 282. (Emphasis added).

The *Rivera* case is the proper application for the compulsary process clauses interpreted by *Chambers, supra*. See, Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 Minn L Review 521 (1992). Professor Imwinkelried discusses the common law and statutory hearsay rules in the United States. Specifically, the treatment of the prosecution and defense in the same fashion. He notes that defense counsel must establish the reliability of hearsay when a declarant is unavailable for trial. *Id.* at 542. He criticized state court decisions which place a heavy burden on the defendant to show the reliability necessary to comply with the trustworthy requirement of *Chambers*. *Id.* at 542.

> The standard applicable to defense hearsay arguably is even lower than that governing prosecution hearsay. With some support in the lower court case law, **Professor Westen has contended that "[t]here is only one point at which the jury should not be allowed to consider the evidence-where the evidence is so inherently unreliable that it cannot rationally be evaluated."** In Westen's[2] judgment, the accused has a constitutional right to present evidence critical

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[2] Professor Westen was co-counsel for Mr. Chambers at the United States Supreme Court.

to his defense "unless the court concludes that the evidence is so inherently unreliable that reasonable people, properly cautioned, could not rationally rely on it." **If the defense hearsay satisfies that minimal standard and bears significantly on a crucial issue in the case, the hearsay is capable of generating reasonable doubt and thus should be admitted.**

The Supreme Court's 1987 decision *Rock v Arkansas* supports Westen's argument. The issue in *Rock* was whether the accused could testify to certain facts which she remembered only after hypnotic induction. The lower courts precluded her from testifying to those facts; they held that hypnotically enhanced testimony is so unreliable that it is per se inadmissible. On appeal, the Court vacated the accuse's conviction.

The Court found that the State had not demonstrated that hypnotically enhanced testimony is always so untrustworthy that a per se rule of inadmissibility is justified. The Court's opinion thus suggests that the prosecutor may have the burden on the issue of the reliability of the defense evidence. **Judge Blackmun writing for the majority, noted that "the State in *Chambers*, did not demonstrate that the hearsay testimony, which bore 'assurances of trustworthiness,' including corroboration by other evidence, would be unreliable. Justice Blackmun not only referred back to *Chambers*, he also expressly cited Professor Westen's writings.** Thus, *Rock* may signal a lowering of the standard for evaluating the reliability of defense hearsay. *Id.* at 543-4. (Footnotes omitted). (Emphasis added).

Importantly, Professor Imwinkelried noted the difference between the prosecution burden of satisfying reliability to overcome a confrontation clause objection by the defense from the burden on the defense to show reliability to overcome a common law hearsay objection of the prosecutor. In the former case, the burden on the prosecution deals with overcoming a constitutional right to confrontation. In the latter case, the reliability only has to overcome a common law hearsay objection. Further, in the latter case, the accused's constitutional right to compulsory process has to be balanced against the weight of the prosecution's hearsay rule. See, Westen, *Compulsory Process Clause*, 73 Mich L Rev 71, 157 (1974) and Westen, *Compulsory Process II*, 74 Mich L Rev 191, 304 (1975), which are both cited with approval by Professor Imwinkelried.

Therefore, the trial court's ruling that the statement of Copeland should not have been admitted under MRE 804(b)(3) was in error. See also, *United States v Lopez*, 777 F2d 543, at 554 (10th Cir, 1985). This error resulted in a denial of Mr. Barrera's constitutional right to present a defense. See also, *Crane v Kentucky*, 476 US 683 (1986); Whitebread, *Criminal Procedure*, § 28.06 (Third Ed, 1993).

SUMMARY

Given the history of MRE 804(b)(3), which included acknowledgment of the constitutional right to present a defense outweighs local hearsay rules; it is clear that the Michigan Supreme Court's ruling was correct.

RELIEF REQUESTED

WHEREFORE, Mr. Barrera requests this Honorable Court deny certiorari.

Respectfully submitted,

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Dated: September 4, 1996

OPPOSITION BRIEF

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OCTOBER TERM, 1996

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

-vs-

PATRICK MICHAEL MUSALL

Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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Petitioner,

-vs-

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Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, PATRICK MICHAEL MUSALL, who is now held in a Michigan State Penitentiary, asks leave to file the attached **BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES** (witout prepayment of costs) and to proceed in forma pauperis pursuant to rule 39.

STATE APPELLATE DEFENDER OFFICE

Debra A. Gutierrez McGuire

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Suite 3300, Penobscot Building
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Detroit, Michigan 48226
(313) 256-9833

Date: September 5, 1996

No. 96-189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 199_

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

-vs-

PATRICK MICHAEL MUSALL

Respondent.
_____/

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, PATRICK MICHAEL MUSALL, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ___ No 1/

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

N/A

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

4-22-96 approx $25.00

2. Have you received within the past twelve months from any of following sources?

a. Business, profession or form of self-employment?

Yes ___ No ✓

b. Rent payments, interest or dividends?

Yes ___ No ✓

c. Pensions, annuities or life insurance payments?

Yes ___ No ✓

d. Gifts or inheritances?

Yes ✓ No ___

e. Any other sources?

Yes ___ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

$ 200.00 from family members (9-95 through 9-96) (gifts)

3. Do you own any cash or checking or savings account?

Yes ✓ No ___ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

$0.60 (prison account)

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

Patrick Michael Musall

PATRICK MICHAEL MUSALL

No. 96-189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

-vs-

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BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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QUESTION PRESENTED

SHOULD THIS COURT REVIEW A STATE COURT DECISION WHICH IS PREMISED ON THAT COURT'S INTERPRETATION OF ITS OWN EVIDENTIARY RULE?

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OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at People v. Barrera, and People v. Musall, 451 Mich. 261; 547 N.W.2d. 280 (1996) and is Appendix A of Petitioner's Petition for a Writ of Certiorari. The Michigan Court of Appeals decision is unpublished and included in Petitioner's Petition for a Writ of Certiorari as Appendix B.

STATEMENT OF LACK OF JURISDICTION

The Michigan Supreme Court's decision was entered on May 7, 1996, and is based on the state court's interpretation of Michigan Rule of Evidence 804(b)(3). For that reason, this Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1257, as claimed by Petitioner.

STATEMENT OF THE CASE

Respondent Patrick Michael Musall was tried with Mark Barrera and Fred Johnson in a joint trial before separate juries for the stabbing death of prostitute Deborah Haynes. A fourth defendant, Matthew Copeland, who admitted to police that he alone stabbed the decedent based on a personal motive, was tried separately.

On January 27, 1989, during a pretrial hearing on a motion to quash the criminal charges, the judge reviewed testimony of the medical examiner, given at Mr. Musall's preliminary examination. He noted that the complainant suffered slash wounds and one stabbing injury.

The prosecutor introduced the statements of Mr. Musall, Mr. Barrera and Mr. Johnson against them in their respective trials. All three of them named Matthew Copeland as the sole killer. On March 7, 1989, Copeland's girlfriend Carol Keene testified at trial that she saw Copeland after the killing and noticed that there was blood on his pants. Keene also saw Mr. Musall, Mr. Barrera, and Mr. Johnson that evening. Yet, Keene did not indicate that she saw blood on anyone other Copeland.

At a later point in Mr. Musall's trial, the defense attorney attempted to admit Copeland's confession as a statement against penal interest under Michigan Rule of Evidence 804(b)(3). The judge denied the motion after finding that Copeland's confession was not inculpatory and was not sufficiently corroborated by other evidence.

After his conviction was affirmed by the Michigan Court of Appeals, Mr. Musall sought leave to appeal in the Michigan Supreme Court. The state Supreme Court granted leave to appeal to decide whether the trial court "abused his discretion" in refusing to admit evidence of Copeland's confession at Mr. Musall's trial.

Relying on its interpretation of Michigan Rule of Evidence 804(b)(3), the Michigan Supreme Court reversed Mr. Musall's conviction and ordered that he receive a new trial. People v. Musall, 451 Mich. 261; 547 N.W.2d. 280 (1996)

Respondent Musall now asks this Court to deny the prosecutor's petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

In its opinion reversing Mr. Musall's conviction the Michigan Supreme Court relied on state evidentiary rules no less than eighteen (18) times. The state court referred to Michigan Rule of Evidence 804(b)(3), the state hearsay exception for statements against penal interest, at least 14 times. In determining whether Copeland's confession was trustworthy and sufficiently corroborated, the Michigan Supreme Court relied on a prior state court decision, People v. Poole, 444 Mich. 151; 506 N.W.2d. 505 (1993), which previously interpreted MRE 804(b)(3) in the context of a prosecutor's attempt to admit a statement against penal interest to inculpate the accused. People v. Barrera, and People v.Musall., 451 Mich. 261, 274-276; 547 N.W.2d. 280 (1996).

The Michigan Court initially noted both that Mr. Musall sought to admit the declarant's confession pursuant to MRE 804(b)(3) and that the Court granted leave to consider whether the trial court "abused its discretion" in denying admission of the evidence. People v. Musall, 451 Mich. 261 at 266, 267.

When articulating the standard of review, the Michigan Supreme Court noted that it used a "clearly erroneous" standard to review the trial court's factfindings and an abuse of discretion standard to determine whether the trial court erred in excluding the evidence. People v. Musall, 451 Mich. at 268-269. Because Michigan appellate courts apply a de novo standard of review to Constitutional errors, Sitz v. Department of State Police, 443

Mich. 744; 506 N.W.2d. 209 (1993), it is obvious that the Michigan Supreme Court did not base its decision on the United States Constitution. Rather, the Court clearly based its decision on its interpretation of Michigan Rule of Evidence 804(b)(3).

Throughout the course of its analysis, the Michigan Supreme Court applied the various requirements of MRE 804(b)(3) in determining whether the accomplice's confession should have been admitted. The state Court explicitly analyzed all aspects of the state evidentiary rule.

The Michigan Supreme Court initially addressed whether the statement was against the declarant's penal interest. In doing so, it referred to decisions from other jurisdictions, but only as guidance on how to interpret its own evidentiary rule. The analysis in this portion of the opinion was entirely evidentiary in nature and the state court made no reference to the Constitution. People v. Musall, 451 Mich. at 269-272. Ultimately, the court decided that Copeland's statement was against his penal interest and in doing so, relied exclusively on the trial prosecutor's argument in Copeland's trial as to why his confession was probative of his guilt. People v. Musall, 451 Mich. 261 at 282-283. Consequently, the Michigan Supreme Court's decision is extremely factually oriented to the circumstances of this case and not appropriate for review by this Court.

Obviously, the Court's determination on this factor cannot seriously be challenged. One need not be a legal scholar to realize that a confession to murder is against one's penal

interest. Both this Court and the Michigan Supreme Court have recognized that a confession to murder is against the declarant's penal interests. Williamson v. United States, 512 U.S. ___; 114 S. Ct. 2431; 129 L. Ed. 2d. 476, 485 (1994), People v. Poole, 444 Mich. at 155-156.

When addressing the trustworthiness of the declarant's statement, the Michigan Supreme Court relied almost entirely on its own prior decision in People v. Poole, 444 Mich. 151; 506 N.W.2d. 505 (1993). To the extent it did refer to decisions of other courts, the Michigan Court used them only as further guidance in how to interpret its own evidentiary rule. Although the Michigan Supreme Court briefly mentioned the Constitutional right to present a defense, People v. Musall, at 279, 293, it used the test previously articulated in its own Poole decision to determine that the statement was sufficiently corroborated to be admissible under MRE 804(b)(3). People v. Musall, 451 Mich. at 289, 293. The Court noted the lack of a close relationship between the declarant and Mr. Musall which would induce Copeland to "take the rap" for him. (Criterion 1 of the Poole test). Further, Copeland made a voluntary statement after being advised of his Miranda rights. (Criterion 2 of the Poole test). Nor was there evidence that Copeland made the statement to curry favor with the authorities. (Factor three of the Poole test). Copeland said he was not promised anything in exchange for his statement and in fact was later sentenced to nonparolable life imprisonment. People v. Musall, Id. at 289-290. The Michigan Supreme further noted that

Copeland's admission to the stabbing was also corroborated by the statements of his three companions, Mr. Musall, Mr. Barrera, and Mr. Johnson, who were each interrogated separately. Id. at 289.

This case presented additional corroboration which was not even addressed by the Michigan Supreme Court. For instance, Copeland's girlfriend, Carol Keene, who saw all four defendants after the stabbing saw blood on Copeland's pants. Yet, she never indicated that she observed blood on Mr. Musall, Mr. Barrera, or Mr. Johnson. She further admitted that Copeland made statements to her after the killing. Because Keene testified before the defense sought to admit Copeland's confession, the trial judge was aware of her testimony when he ruled on the motion.

The medical examiner's testimony as to the cause of death further corroborated Copeland's confession. She verified that the decedent was killed with a knife as was admitted by Copeland. At the time he ruled on the motion to admit Copeland's confession, the trial court judge knew of her opinion as to the cause of death because he reviewed her preliminary examination testimony when ruling on the defense motion to quash.

Further corroboration of Copeland's admission to murder is supplied by other portions of his confession. In that confession, he admitted that he told at least three friends that he killed the decedent. One of these persons was Carol Keene. This Court has previously held that a reviewing court can look to the accomplice's statement itself to determine whether it satisfies the evidence

rules. Bourjaily v. United States, 483 U.S. 171; 107 S. Ct. 2775; 97 L. Ed. 2d. 144 (1987).

Based on these circumstances, it is overwhelmingly apparent that Copeland's statement was sufficiently corroborated to render it admissible as a statement against penal interest under MRE 804(b)(3). If this statement is insufficiently corroborated, it is unlikely that any statement could be found to be sufficiently corroborated.

As he did throughout the Michigan Courts, the petitioner mistakenly claims in this Court that only Mr. Musall's statement corroborated Copeland's confession. (Petitioner's Petition for Writ of Certiorari, p. 19). As illustrated above, the petitioner's claim is simply false. Most likely, this is the reason the Michigan Supreme Court so summarily dismissed this claim. People v. Musall, 451 Mich. at 278.

This Court refuses to decide cases where the state court based its ruling on an adequate and independent state ground. Michigan v. Long, 463 U.S. 1032, 1040; 103 S. Ct. 3469; 77 L. Ed. 2d. 1201 (1983). Respect for the "independence of state courts, as well as avoidance of rendering advisory opinions" are the "cornerstones of this principle. Id. As this Court has noted "it is fundamental that state courts be left free and unfettered" by this Court in interpreting state law. Long, at 1041. The principle that this Court will not review "judgments of state courts that rest on adequate and independent state grounds" is based, in part, on the limitations of this Court's jurisdiction. Michigan v. Long, 463

U.S. 1032 at 1041-1042. Because this Court has no power to review "a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision would not affect the judgment and would be advisory". Coleman v. Thompson, 501 U.S. 722, 729; 111 S. Ct. 2546; 115 L. Ed. 2d. 640 (1991).

This Court will assume that a state court's decision is not based on independent and adequate state grounds only when it appears that the "state court rested its decision primarily on federal law". Long, 463 U.S. at 1042. On the other hand, where the state court decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment", this Court will not review the issue even if it addresses a "question of federal law". Coleman v. Thompson, 501 U.S. 722, 729; 111 S. Ct. 2546; 115 L. Ed. 2d. 640 (1991). This rule applies whether the state ground is substantive or procedural. Id.

In this case, the grounds upon which the Michigan Supreme Court's decision rests are not the least bit ambiguous. The Michigan Supreme Court clearly relied on state grounds to resolve the question of whether Copeland's statement was admissible at Mr. Musall's trial. As noted previously, the state court referred to MRE 804(b)(3) no less than 14 times during the course of its legal analysis. Additionally, the court relied on four other Michigan evidence rules in its decision. When evaluating the

trustworthiness of Copeland's confession, the state court relied exclusively on a prior Michigan Supreme Court decision.

This case is not worthy of this Court's attention. The Michigan Supreme Court's decision is extremely fact-based and rested in large part upon the particular facts of this case. In fact, the Michigan Supreme Court noted that it will review admission of statements pursuant to MRE 804(b)(3), on a "case-by-case basis". People v. Musall, 451 Mich. 261 at 278-279.

The Michigan Supreme Court found exclusion of declarant Copeland's statement to be even more prejudicial in Mr. Musall's case than in co-respondent Barrera's case. People v. Musall, 451 Mich. 261, at 293. In making this finding, the Court relied heavily on the unique facts present in this case. Specifically, the Michigan Court noted that the trial prosecutor's theory in Copeland's trial was directly contradictory to the theory he presented in Mr. Musall's trial. Id. He argued to Copeland's jury that Mr. Musall "miraculously" avoided being killed by Copeland, while he suggested to Mr. Musall's jury that he may have participated in the stabbing. Id. This is an extremely fact-oriented decision without wide-range application. Unless such prosecutorial insincerity and inconsistency is a nationwide epidemic of such magnitude as to have federal Constitutional implications, this case does not merit review by this Court.

One can imagine nothing more sacred to a state court than its unfettered ability to interpret its own state evidentiary rules. If this Court's refusal to review cases decided on "independent and

adequate" state grounds is not meaningless, it prohibits this Court from interfering with the Michigan Supreme Court's interpretation and application of Michigan Rule of Evidence 804(b)(3). Because this case strictly involves such an interpretation, it is not an appropriate case to be reviewed by this Court.

Respondent Patrick Michael Musall asks this Court to deny petitioner's Petition for a Writ of Certiorari.

RELIEF

WHEREFORE, for the foregoing reasons, Respondent **PATRICK MICHAEL MUSAL** requests that this Honorable Court deny petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: Debra A. Gutierrez McGuire

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Dated: September 5, 1996

No. 96-189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996_

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

-vs-

PATRICK MICHAEL MUSALL

Respondent.
_____/

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

VIRGINIA M. MELOSKY, being first sworn, says that on September 5, 1996, she Mailed the following to this Court by U. S. Mail at the Main Post Office, Fort Street, Detroit, Michigan:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT IN SUPPORT OF MOTION
BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI
CERTIFICATE OF SERVICE

and she mailed one copy of same to:

MICHIGAN ATTORNEY GENERAL
Law Building, 525 W. Ottawa
Lansing, Michigan 48913

WAYNE COUNTY PROSECUTOR
Frank Murphy Hall of Justice
1441 St. Antoine - Rm 1200
Detroit, Michigan 48226

Virginia M. Melosky

VIRGINIA M. MELOSKY

IDEN NO. 12329 LVG-SADO (6403 T-J)
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September 5, 1996

Clerk
United States Supreme Court
Washington, D. C. 20543

Attention: Ms. Kathy Tycz
Document Control Center

Re: **Patrick Michael Musall v People of The State of Michigan**
Case No. 96-189

Dear Clerk:

Enclosed for filing are the original and nine (9) copies of Motion For Leave To Proceed In Forma Pauperis, Affidavit In Support of Motion To Proceed In Forma Pauperis, Brief In Opposition of Petition For a Writ of Certioari and Certificate of Service covering the above captioned cause.

This pleading is being resubmitted by mailing through the United States Postal Service because I was advised that the original pleading of August 30, 1996, was not received by this Court.

Sincerely,

Debra A. Gutierrez McGuire

Debra A. Gutierrez McGuire
Assistant Defender
Counsel of Record

dg:vm
Enclosures

cc: Attorney General
Mr. Patrick Michael Musall
File

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